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IN THE

Supreme Court of the United States

Hwang Geum Joo, Yuan Zhulin, Lola Tomasa Salinog, Liu Huang A-tau, Kim Boon-sun, Kim Sang Hee, Kim Soon-Duk, Yi Yong Nyo, Kim Bok-Dong, Lu Xiuzhen, Guo Yaying, Zhu Qiaomei, Prescila Bartonico, Narcisa Claveria, Maxima Regala de la Cruz, on behalf of themselves and all others similarly situated,

Petitioners,

v.

Government of Japan,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1601-11, codifies the restrictive theory of sovereign immunity adopted by the United States Department of State in 1952. The FSIA enumerates several exceptions to sovereign immunity, including exceptions for commercial activity and expropriation by foreign states. 28 U.S.C. § 1605(a)(2)-(3). In *Republic of Austria v. Altmann*, 124 S. Ct. 46 (Sept. 30, 2003), the Court granted certiorari to resolve the following question: "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?"

Two closely related, and equally important, questions are presented here:

1. Does the commercial activity exception of the FSIA afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?

2. Even absent the FSIA, are enemy nations entitled to sovereign immunity from suits based on their wartime acts, particularly when those acts occur on United States soil?

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The opinion of the district court is reported at 172 F. Supp. 2d 52, and is reproduced in the Appendix at 17a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 332 F.3d 679, and is reproduced in the Appendix at 1a. The D.C. Circuit's orders denying rehearing and rehearing *en banc* are not reported and are reproduced in the Appendix at 46a and 47a.

JURISDICTION

The D.C. Circuit rendered its opinion on June 27, 2003, App. 1a, and denied rehearing and rehearing *en banc* by Orders dated August 22, 2003. App. 46a, 47a. This Court has jurisdiction to review this matter on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND TREATY

The provisions of 28 U.S.C. §§ 1254(1), 1330, 1331, 1350, 1367, 1602, 1605(a)(2), and 1605(a)(5); and the 1951 Treaty of Peace with Japan are lengthy. Pursuant to Supreme Court Rule 14.1(f), they are set out verbatim at Appendix 48a-89a.

STATEMENT OF THE CASE

This case concerns whether the nation of Japan is liable for trafficking in women and girls. Petitioners are fifteen women from China, Taiwan, North and South Korea, and the Philippines who were taken by force, coercion or deception by the Japanese military between 1931 and 1945 and forced to serve as sex slaves – euphemistically known as "comfort women" – in state-run brothels, or "comfort stations," where they were repeatedly raped and beaten by

Japanese soldiers. Complaint ("Cpt."), ¶¶ 1, 7-21; App. 92a, 94a-110a.[1] The state-run comfort stations were operated as businesses where Japanese soldiers were required to pay for the use of the women. Cpt. ¶¶ 8, 55; App. 95a-97a, 121a. The prices charged to solders varied according to the women's perceived ethnic inferiority. *Id.* One of the Petitioners was only ten years old at the time of her abduction and enslavement. Cpt. ¶ 20; App. 107a-109a. The others ranged in age from thirteen to twenty-six. Cpt. ¶¶ 7-19, 21; App. 92a-107a, 109a-110a. To this day, these women still bear the physical and psychological scars of their brutalization at the hands of the Japanese government. Cpt. ¶¶ 7-21, 64; App. 92a-110a, 124a.

Historians estimate that Japan enslaved as many as 200,000 comfort women before and during World War II, and that only about 30% of them survived the war. David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?,* 32 COLUM. J. TRANSNAT'L L. 533, 541-42 (1995). Most comfort women came from Korea, China, and other Asian countries occupied by Japan, *id.,* but a recently declassified document indicates that approximately twenty American nurses were captured by the Japanese military at Corregidor and forced to serve as sex slaves. Fletcher F. Isbell, *Military Attache Report New Guinea: Jap Prostitution of Nurses Captured at Corregidor*, Military Intelligence Division W.D.G.S., Report No. 32 (August 21, 1944) at 1. Japan operated comfort stations throughout the areas of Asia

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[1] In reviewing a decision granting a motion to dismiss, this Court accepts as true all factual allegations in the Complaint. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1 (2002).

and the Pacific it controlled during the war, including on American territory in Guam and the Philippines. Cpt. ¶ 57, App. 122a; Yoshimi Yoshiaki, *Comfort Women* 91 (Suzanne O'Brien trans., Columbia Univ. Press 2000) (1995).

The Japanese government destroyed many relevant documents at the end of World War II. Cpt. ¶ 40; App. 115a-116a. It steadfastly denied involvement in the enslavement and forced prostitution of the comfort women until 1992, when Japan's Chief Cabinet Secretary admitted for the first time the government's role in operating the comfort stations. Cpt. ¶ 70; App. 127a. Even then, Japan continued to deny any role in "recruiting" the comfort women, claiming the comfort stations were the work of "private entrepreneurs." Cpt. ¶¶ 68-70; App. 126a-127a. Other than its Chief Cabinet Secretary's belated expression of "deep remorse," Japan has made no reparations, acknowledged no liability, and undertaken no prosecutions relating to the abduction, enslavement, and forced prostitution of the comfort women. Cpt. ¶¶ 70-71, App. 127a.

After the Japanese government's operation of the comfort stations was revealed, Petitioners sued Japan, on behalf of themselves and other comfort women, in the United States District Court for the District of Columbia, under the Alien Tort Claims Act, 28 U.S.C. § 1350. They invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1350, 1367, and 1605(a).

The district court dismissed Petitioners' claims for lack of subject matter jurisdiction. The United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the FSIA's commercial activity exception to sovereign immunity did not apply to claims based on pre-

1952 conduct, and that sovereign immunity therefore barred Petitioners' claims.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's holding that the FSIA does not apply to claims based on pre-1952 conduct directly conflicts with the holding of the United States Court of Appeals for the Ninth Circuit in *Altmann v. Republic of Austria,* 317 F.3d 954 (9th Cir. 2002), *cert. granted,* 124 S. Ct. 46 (Sept. 30, 2003). The Court granted certiorari in *Altmann* on the following question, which the Ninth Circuit answered in the affirmative: "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?" Petitioners seek a writ of certiorari here on the two closely related and equally important questions set forth above.

I. The Decision Below Conflicts With The Ninth Circuit's Decision In *Altmann* And With This Court's Retroactivity Jurisprudence.

Until 1952, the State Department ordinarily requested, and our courts usually afforded, immunity from suit to friendly foreign sovereigns. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983).[2] On May 19, 1952, in the "Tate Letter," the State Department announced its adoption of the "restrictive" theory of sovereign immunity,

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[2] The State Department customarily sought the application of sovereign immunity in a particular case by filing a "suggestion of immunity" with the court whose jurisdiction was at issue. *Verlinden,* 461 U.S. at 487.

which provided for immunity in cases involving a foreign sovereign's public acts but not those involving its commercial acts. *Id.* at 487.

Because "the governing standards were neither clear nor uniformly applied," *id.* at 488, Congress, in 1976, passed the FSIA, which "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Id.* To help ensure uniformity, the FSIA provides that, "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602.

The FSIA essentially codified the restrictive theory of sovereign immunity enunciated in the Tate Letter. *Verlinden,* 461 U.S. at 488. Under the FSIA, foreign states are not immune from actions in federal and state courts if the actions fall within the exceptions to sovereign immunity enumerated in sections 1605 and 1607 of the FSIA. *Id.* at 488-89. The FSIA's exception for "commercial activity" of a foreign sovereign, 28 U.S.C. § 1605(a)(2), is central to this case.[3]

The D.C. Circuit's decision in this case that the FSIA's commercial activity exception does not apply to

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[3] Although not specifically alleged in Petitioners' Complaint, the exception for tortious acts of foreign states on American soil, 28 U.S.C. § 1605(a)(5), also applies to some of Japan's conduct at issue here. Petitioners raised § 1605(a)(5) at oral argument before the district court, and should, on remand, be permitted to amend their complaint to allege violation of this section. *See Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 585 (D.C. Cir 1985) (citing *Foman v. Doris*, 371 U.S. 178, 182 (1962)).

claims based on pre-1952 conduct conflicts with the Ninth Circuit's decision in *Altmann* that the FSIA's expropriation exception to sovereign immunity, 28 U.S.C. § 1605(a)(3), *does* apply to claims based on pre-1952 conduct. *Compare* App. 16a ("the commercial activity exception to the FSIA does not apply retroactively to events . . . occurring before May 19, 1952"), *with Altmann*, 317 F.3d at 967 ("we hold that application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive"). The United States also recognizes this conflict: in its Brief for the United States as Amicus Curiae Supporting Petitioners in *Republic of Austria v. Altmann*, 03-13 (Nov. 2003), the United States cites *Hwang Geum Joo v. Japan* extensively for support when urging the Court to reject *Altmann*.[4]

The D.C. Circuit attempts to distinguish *Altmann* on two bases: the 1951 Treaty with Japan and the 1949 "Bernstein" letter. App. 10a, 11a. Neither distinction is persuasive. Although the D.C. Circuit states that "there was no similar treaty with Germany or Austria, and therefore no similar settled expectation" of immunity, App. 11a, in fact there was a series of post-war treaties similar to the 1951 Treaty with Japan that dealt with restitution and reparations for the acts of the Nazi regime.[5] The panel also mistakenly

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[4] Similarly, the first case cited to illustrate a conflict between the circuits by Austria in its *Petition for A Writ of Certiorari* at 10, *cert. granted* 124 S. Ct. 46 (Sept. 30, 2003), is *Hwang Geum Joo v. Japan*.

[5] In fact, Japan itself acknowledges in its discussion of the D.C. Circuit opinion that "the United States *did* enter into treaties with Germany and Austria." Brief for Amicus Curiae Japan in Support of

(continued...)

asserted that the State Department position embodied in the Bernstein letter applied only to the Nazis and that "we are not aware of, any similar statement of policy regarding the alleged acts of Japan in this case." App. 12a. In fact, the United States issued a series of declarations, referred to in the Bernstein letter itself, that were directed at all enemy nations, including Japan. *See, e.g.,* "Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory," 8 Dep't State Bull. 21 (Jan. 9, 1943). Moreover, the United States consistently condemned Japan's World War II activities. *See, e.g.,* 8 Dep't State Bull. 49 - 55 (Jan. 16, 1943)("No other civilized society sells its young girls to panderers with such openness ... Japanese soldiers have made 'Japanese' a synonym for murder, torture, and rape"). Finally, the Bernstein letter was not the only factor on which the Ninth Circuit relied in reaching its conclusion.

The question whether the FSIA's enumerated exceptions to sovereign immunity apply to claims based on pre-1952 conduct is an important one, as the Court implicitly recognized when it granted certiorari in *Altmann.* Indeed, as the Court has noted, "Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts" when it enacted the FSIA. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 622 n.11 (1983) (quoting H.R. Rep. No. 94-1487, p.32); *see also Verlinden,* 461 U.S. at 489 (same). The conflicting decisions of the federal courts of appeals regarding the

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[5](...continued)
Petitioners, at 25, n. 5, *Republic of Austria v. Altmann*, 03-13 (Nov. 2003) (emphasis added) (citing treaties).

application of the FSIA to claims based on pre-1952 conduct have destroyed the uniformity Congress sought to create by enacting the FSIA. The Court should grant this petition to reconcile the conflict among the Circuits and to restore the uniformity the FSIA was designed to promote.

In addition to conflicting with the decision in *Altmann*, the decision below cannot be reconciled with this Court's retroactivity jurisprudence. In *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Court observed: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *See also id.* at 292 (Scalia, J., concurring) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Jurisdictional statutes regulate primarily the power of courts, rather than the actions of parties. Therefore, "the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised," rather than the moment of the conduct from which the case arises. *Id.* at 293 (Scalia, J., concurring). As Justice Scalia reasoned in *Landgraf*:

> Our jurisdiction cases are explained, I think, by the fact that *the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.* Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it

> retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Id. (emphasis added). *See also Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring) ("statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties").

The FSIA does not alter the substantive rights or obligations of the parties, but merely regulates where cases against foreign sovereigns may be brought.[6] As the Court has noted, "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank*, 462 U.S. at 620; *see also Altmann*, 317 F.3d at 966 ("application of the FSIA infringes on no right held at the time the acts at issue occurred").

Because it addresses the jurisdiction of courts rather than the substantive rights of litigants, the FSIA applies in all cases against foreign sovereigns decided subsequent to its enactment. *See Landgraf*, 511 U.S. at 274 ("We have regularly applied intervening statutes conferring or ousting

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[6] An expectation of immunity is not a substantive right that will prevent retroactive application of a statute. *See United States v. Alabama*, 362 U.S. 602, 604 (1960) (applying provision authorizing civil rights actions against a State in case filed before provision's enactment); *see also Verlinden*, 461 U.S. at 486 (foreign sovereign immunity is not a right but "a matter of grace and comity on the part of the United States").

jurisdiction"); *Altmann,* 317 F.3d at 967 (applying FSIA to claims based on pre-1952 conduct); *Creighton Ltd. v. Gov't of Qatar,* 181 F.3d 118, 123-34 (D.C. Cir. 1999) (applying FSIA's arbitration exception to claims based on conduct pre-dating its enactment); *Haven v. Republic of Poland,* 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (applying FSIA to claims based on events prior to and during World War II); *Crist v. Republic of Turkey*, 995 F. Supp. 5, 9 (D.D.C. 1998). *But see* App. 16a; *Carl Marks & Co. v. U.S.S.R.,* 841 F.2d 26, 27 (2d Cir. 1988); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497 (11th Cir. 1986).

Indeed, in *Verlinden,* the Court recognized that the FSIA applied to a case arising from Nigeria's alleged anticipatory breach, *in September 1975,* of a letter of credit. 461 U.S. at 483. The court of appeals in *Verlinden* had held that the FSIA unconstitutionally expanded the jurisdiction of federal courts beyond the bounds of Article III. This Court reversed, finding the Act constitutional. Notwithstanding the fact that the conduct complained of in *Verlinden* occurred prior to the 1976 passage of the FSIA, the Court assumed the FSIA applied and remanded for consideration of "whether jurisdiction exists under the Act." *Id.* at 498. Here, as in *Verlinden,* the conduct at issue occurred prior to 1976. The Court's remand in *Verlinden* for application of the FSIA suggests that the court below erred in concluding that the FSIA's commercial activity exception could not apply here.[7]

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[7] In addition, the policy discussed in the Tate Letter was applied by the State Department to requests for immunity made after 1952, regardless of when the underlying cause of action accrued. For example, in a suit brought against Korea for damage to a steamship

(continued...)

The Court's decision in *Hughes Aircraft Co. v. United States,* 520 U.S. 939 (1997), is not to the contrary. In *Hughes*, the Court held that a 1986 amendment to the False Claims Act that eliminated a full defense based on pre-suit disclosure to the government should not be applied retroactively. Prior to the 1986 amendment, there was no private cause of action based on submission of false claims to the government where the government knew of the claims' falsity. *Id.* at 941. After the 1986 amendment, the government's possession of the relevant facts no longer precluded all private *qui tam* actions. *Id.* Thus, the 1986 amendment substantively amended the False Claims Act to create a cause of action where none had previously existed.

Unlike the provision at issue in *Hughes,* the FSIA does not create or eliminate any substantive causes of action: trafficking in women and slavery were unlawful and actionable before the FSIA's enactment and remain unlawful and actionable today. The FSIA merely addresses *which* courts may entertain cases alleging conduct by foreign

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[7](...continued)
sustained in 1951, the State Department applied its new policy and "declined to make the requested suggestion of immunity from suit ... [as] it does not appear the claim rests upon acts of a purely governmental character." *New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 686 (S.D.N.Y. 1955). Likewise, when analyzing a counterclaim brought against China for a 1948 loan default, the Court discussed the import of the Tate Letter without regard to the fact that the conduct at issue occurred before 1952. *See Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-61, 364 (1955).

sovereigns that violates *other* laws.[8] The FSIA, therefore, properly applies to all suits decided after its enactment. *See Hughes,* 520 U.S. at 951 ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.") (emphasis in original; citing *Landgraf,* 511 U.S. at 275, 291).

Because the D.C. Circuit's holding that the FSIA's commercial activity exception does not apply to claims based on pre-1952 conduct conflicts with the Ninth Circuit's holding in *Altmann* and with this Court's retroactivity jurisprudence, the Court should grant this petition. In the alternative, the Court should hold this petition pending a decision in *Altmann.*[9]

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[8] Japan was amenable to suit for its commercial acts in other courts, as almost all other nations had already adopted the restrictive theory of immunity by 1952. *See* Tate Letter; Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 Va. J. Int'l L. 765, 769 (1996). In fact, by the time of the Tate Letter, the United States had ceased claiming immunity in foreign courts and subjected itself to contract and tort cases. *See* Tate Letter at 2; Gergen at 769.

[9] The United States has similarly asked the Court to hold the petitions for certiorari filed in *Garb v. Republic of Poland* and *Whiteman v. Austria*, 72 Fed. Appx. 850 (2d Cir. 2003), Nos. 03-500 and 03-517. Brief For the United States as Amicus Curiae Supporting Petitioners at 24, n.15, *Republic of Austria v. Altmann*, 03-13 (Nov. 2003). Those petitions also present questions relating to the retroactivity of the FSIA.

II. This Court's Review Is Warranted To Decide The Important Question Whether, Even Absent The FSIA's Commercial Activity Exception, Enemy Nations Are Entitled To Sovereign Immunity From Suits Based On Their Wartime Acts.

The Court first announced the doctrine of foreign sovereign immunity in *The Schooner Exchange v. McFaddon,* 11 U.S. 116 (1812). While observing that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute [and] susceptible of no limitation not imposed by itself," *id.* at 136, Chief Justice Marshall, writing for the Court, held:

> It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a *friendly* power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Id. at 145-46 (emphasis added).

"[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden,* 461 U.S. at 486. The immunity traditionally afforded friendly foreign sovereigns in our courts stems from the recognition that "[t]he judicial seizure of the property of a *friendly* state may be regarded as . . . an affront to its dignity and may . . . affect our relations with it." *Republic of Mexico v. Hoffman,* 324 U.S. 30, 35-36 (1945) (emphasis added); *see also Verlinden,* 461 U.S. at 486 ("Until 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign sovereigns") (emphasis added); *Ex*

Parte Republic of Peru, 318 U.S. 578, 586-87 (1943) (sovereign immunity determination "involves the dignity and rights of a *friendly* sovereign state") (emphasis added). Obviously, considerations of grace, comity, and dignity apply far less, if at all, in actions against enemy nations.

Earlier this year, in *Abrams v. Société Nationale des Chemins de Fer Français,* 332 F.3d 173 (2d Cir. 2003), the Second Circuit addressed the district court's dismissal, on sovereign immunity grounds, of plaintiffs' claims against the French national railroad for its role in transporting Holocaust victims to Nazi death camps during World War II. *Id.* at 174-75. The court of appeals questioned whether sovereign immunity would apply to claims based on wartime crimes of enemy nations:

> [T]he State Department's treatment of ordinary litigation with friendly foreign states in times of peace does not necessarily indicate the position the Department would have taken on claims closely related to war-time crimes of an enemy, such as plaintiffs' claims here.

Id. at 187. The Second Circuit vacated the district court's dismissal of the case and remanded for further proceedings, including an inquiry into the State Department's position during World War II on issues pertaining to sovereign immunity. *Id.* at 188.

In her dissenting opinion in an analogous case, *Princz v. Federal Republic of Germany,* 26 F.3d 1166 (D.C. Cir. 1994), Judge Wald of the D.C. Circuit concluded that sovereign immunity would not shield Germany from liability for crimes perpetrated during World War II:

> The operative question, then, is whether the executive branch would have recommended immunity for the perpetrators of the Holocaust. The intuitive answer is no.
>
> In the mid-1940's, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the Holocaust.

Id. at 1179 (Wald, J., dissenting).

It similarly strains credulity to posit that the State Department would have filed a suggestion of immunity on behalf of the Japanese government during the period from 1931 to 1945, when Petitioners were abducted, enslaved, and forced into prostitution by the Japanese military. As early as 1931, the United States recognized the threat posed by Japan's aggression in East Asia and in the Pacific. *See generally, Chronological History of Certain Major International Events Leading Up To and During World War II With the Ostensible Reasons Advanced For Their Occurrence,* 1931-1944, H.R. Doc. No. 78-541, at 4 (1944). A decade of subsequent events, including Japan's further encroachment into Southeast Asia and the South Seas, led the United States, in 1941, to freeze Japanese assets and terminate discussions concerning occupied Indochina. From 1941 to 1945, the United States and Japan were at war.

Accordingly, even if the FSIA does not apply to cases arising from Japan's actions during this period, sovereign

immunity should still be denied, for it undoubtedly would have been at the time of the relevant events. Absent a suggestion of immunity by the executive branch, our courts would not have granted sovereign immunity to Japan prior to enactment of the FSIA. As Chief Justice Stone observed in 1945, in rejecting Mexico's claim of sovereign immunity where the executive branch had declined to suggest immunity, it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman,* 324 U.S. at 35; *see also The Navemar,* 303 U.S. 68, 74-75 (1938) (rejecting Mexico's claim of sovereign immunity where State Department had declined to suggest immunity).

Although the D.C. Circuit reasoned that "the 1951 Treaty [with Japan] created a settled expectation, left undisturbed by Congress, that Japan would not face suit in the courts of the United States for its actions during World War II," App. 16a, Korea and China, home to the vast majority of the comfort women, were not parties to the 1951 Treaty.[10] Their citizens' claims, therefore, cannot be extinguished by it. *See Flores v. Southern Peru Copper Corp.,* 343 F.3d 140, 162 (2d Cir. 2003) (treaties "are legally binding only on States that become parties to them by consenting to be bound") (citing Lord McNair, *The Law of Treaties* 162 (1961)); *United States v. Yousef,* 327 F.3d 56,

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[10] Moreover, the 1951 Treaty did not purport to close U.S. courts to any claims. The Treaty provided for the seizure of certain Japanese assets to satisfy the claims of allied nationals and the costs of occupation, and in exchange waived reparations claims and claims for direct military costs of occupation. The subsequent treaties signed by China and Korea did not waive the claims of their nationals.

95 n.28 (2d Cir. 2003) ("Only 'ratification' of the treaty causes the treaty to become binding on the signing party.").

In addition, the D.C. Circuit failed to explain how the 1951 Treaty could "create[] a settled expectation" before its ratification. At most, the Treaty could have affected Japan's expectations from September 8, 1951, when it was signed, until May 19, 1952, when the United States adopted the restrictive theory of sovereign immunity later codified in the FSIA. As the Ninth Circuit noted, "To the extent courts have considered the retroactivity of the FSIA, the consensus appears to be that it would encompass events dating back at least as far as the date of [the May 19, 1952 Tate] letter." *Altmann,* 317 F.3d at 962 (citations omitted).

For the reasons set forth in section I, above, Petitioners believe that, like other jurisdictional statutes, the FSIA applies to all cases decided after its enactment. To the extent the Court entertains any doubt that the FSIA applies to cases arising from pre-1952 conduct, the Court should grant this petition to decide whether, even absent the FSIA, enemy nations in general, and Japan in particular, are entitled to absolute immunity from suits based on their wartime acts, particularly when those acts occur on United States soil.[11] In the alternative, because the Court's decision in *Altmann* will

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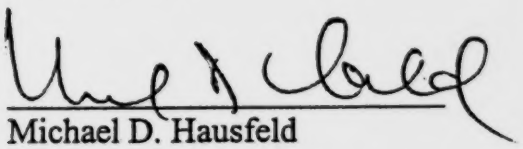
[11] In its amicus brief in *Altmann,* the United States acknowledges that under pre-FSIA law, a foreign sovereign was more susceptible to suit based on conduct or assets located within the United States than to suit based exclusively on "conduct within its own territory." Brief for the United States as Amicus Curiae Supporting Petitioners at 25 & n.17, *Republic of Austria v. Altmann,* 03-13 (Nov. 2003).

likely either resolve or directly implicate this question,[12] the Court should hold this petition pending its decision in *Altmann*.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari on each of the two questions presented by this Petition. In the alternative, the Court should hold this Petition pending decision of the closely related question on which the Court granted certiorari in *Altmann*.

Respectfully submitted,



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[12] *Altmann* held that whether a statute can be applied retroactively depends in part on whether the foreign nation, at the time its conduct took place, "could legitimately expect to receive immunity" for its actions. *See Altmann*, 317 F.3d at 964. Japan, an enemy nation, cannot have reasonably expected immunity in the United States for its wartime trafficking of plaintiffs in U.S. territory.

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